

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 212 of 1985

Hon'ble MR.JUSTICE R.K.ABICHANDANI

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

JAISINGH R AGRAWAL

Versus

STATE OF GUJARAT

Appearance:

MR SHALIN MEHTA for MR GIRISH PATEL for Petitioners
M/S MG DOSHIT & CO for Respondent No. 2
MR LR PUJARI, AGP, for Respondent No.1
MR JF SHAH for Respondent No. 3

CORAM : MR.JUSTICE R.K.ABICHANDANI

Date of decision: 30/06/2000

ORAL JUDGEMENT

1. The petitioners have challenged the seniority list of Assistant Directors, Health Services (Health) as on 1st October 1983, published on 20th November 1984, on the ground that there was breach of the seniority rule of continuous officiation which should have been adopted in preparing the final list. According to the petitioners,

though the recruitment rules for the post of Assistant Directors (Health) provided for the ratio of 2:1 between appointment by promotion and appointment by nomination, there was no rule or any executive direction providing for the principle of rotation for determining the seniority among them.

2. It appears from the record that the petitioners were serving in the Public Health Department of the Government for many years and that the recruitment rules for the post of Assistant Directors of Public Health were framed under a Resolution dated 7th April 1962 at Annexure-A to the petition. The post of Assistant Director of Public Health could be filled in as per these rules, by promotion from among the District Health Officers or by nomination in the ratio of 2:1 as provided under these rules. Earlier on 30th September 1980, a provisional seniority list of the cadres in the said Department was published and circulated amongst the concerned officers. However, later on the government felt that the earlier provisional list of 30th September 1980 did not contain any norms or principles on the basis of which it was to be prepared and it was only in the nature of gradation list published according to the length of service. Therefore, by Circular dated 21st May 1984, keeping in view the ratio of 2:1 between promotees and direct recruits prescribed under the rules, a fresh provisional seniority list was prepared which is annexed to the Circular at Annexure-C. It appears that the petitioners had challenged the provisional seniority list in Special Civil Application No3502/84, but that petition was withdrawn. Thereafter the final seniority list came to be published under the impugned Circular dated 20.11.1984, which is at Annexure-D to the petition. There are 22 officers in the final seniority list at Annexure-D to the petition in respect of the vacancies that occurred from 7.4.1962. Of these 22 officers, 17 are promotees and 5 are direct recruits. Those 5 direct recruits who would be affected by the outcome of this petition have not been impleaded as party respondents.

3. Learned counsel appearing for the State of Gujarat and the Director of Health submits that the Solicitor who attended to the matter at the admission stage has not handed over papers to the Government Pleader. He was, therefore, provided with a set to go through the papers and was good enough to assist the court. It is a different thing that notwithstanding the pendency of this matter since 1985, no affidavit-in-reply has been filed by the State of Gujarat and it appeared that no-one knew as to where the matter stood though this

matter has been earlier listed before this Court on 30th June 2000, and before that on 28.4.2000 for final hearing. Commenting on this state of affairs will not improve anything and therefore nothing need be said on this aspect.

4. Learned counsel who appeared for the respondent no.3 submitted that the grievance of the petitioners made in paragraph 9 of the petition that the respondent no.3 was wrongly shown in the seniority list does not survive because ultimately his name was removed from the list and the respondent no.3 who tried to challenge that action by filing a petition did not succeed as his petition was rejected. This fact is also borne out from an earlier order dated 8th July 1996 which is endorsed in the papers of this petition. It is stated therein that the learned counsel for the respondent no.3 made a statement that the name of the respondent no.3 was already deleted from the seniority list and that the respondent no.3 had filed the petition being SCA No.2094/85 which was rejected on 4.4.1985. It appears that on that day the present petition was dismissed for default after recording this fact, but it came to be restored later on on 22.7.1997 by an order made in MCA No.1556/96.

5. Learned counsel appearing for the petitioners contended that merely because the quota rule was prescribed under the recruitment rules, which provided a ratio of 2:1, it did not involve prescription of rule of seniority. It was submitted that in absence of any specific rule of seniority having been framed by the Government in respect of this cadre, the normal rule of reckoning seniority from the date of continuous officiation should have been applied, and if that was to be done, then all these petitioners would be ranking senior to the direct recruits who have been shown much above to many of these petitioners despite their appointment being made after several years of the promotions given to the petitioners. It was pointed out by way of an illustration that serial no.3 direct recruit in the final seniority list was appointed on 17.2.1977, but is shown above the promotees who were appointed in 1973 and 1976. Likewise, serial no.9, a direct recruit of 1982 was shown above the promotees of 1978 and 1980. It was submitted that the seniority list prepared by the respondents was based upon the principle of rotation and not on the principle of continuous officiation. It was further argued that if one year was considered as a unit for applying the ratio of 2:1, then the result would be that if there was only one vacancy in a particular year or even two, then in those years the vacancies would go

to the promotees and it is only when there were three vacancies arising in a year, that the question of applying the ratio of 2:1 could arise. From the paragraph 13 of the petition the learned counsel pointed out that this was the basis on which the petitioners had worked out their seniority position to which they were entitled. In the alternative it was contended that even if a year was not taken as a unit and the entire cadre strength was to be looked at in the context of the prescribed ratio, then also there was no scope for application of the principle of rotation because all the promotees out of the quota were required to be given the continuous officiation, while the direct recruits were required to be given the date of their appointments.

6. In support of his contentions the learned counsel relied upon the following decisions of the Supreme Court.

6.1 A.K. Subraman Vs. Union of India, reported in AIR 1975 SC 483 was cited to point out as to when and how was the quota rule to be enforced. The Supreme Court held that when the Assistant Engineers (Class-II) were initially appointed in the regular manner in accordance with the rules to officiate as Executive Engineers, their seniority in service in Grade I will count from the date of their initial officiating appointment in Class I provided their initial officiating appointment as Executive Engineers was within their quota. It was held that the quota rule will be enforced at the time of initial recruitment in an officiating capacity to the grade of Executive Engineer, and not at the time of confirmation. It was further held that the quota rule will be enforced with reference to vacancies in all posts, whether permanent or temporary, included in the sanctioned strength of the cadre, and the operation of the quota rule will not depend upon the availability or non-availability of Assistant Executive Engineers for appointment as Executive Engineers, and that the non-availability of Assistant Executive Engineers for recruitment to the grade of Executive Engineer will not postpone the regular recruitment of the Assistant Executive Engineers as Executive Engineers within their quota. It was further held that if Assistant Engineers are recruited as Executive Engineers in excess of their quota in a particular year, they will be pushed down to later years for absorption when due within their quota.

6.2 Reference was made to N.K. Chauhan Vs. State of Gujarat, reported in AIR 1977 SC 251, in which the Supreme Court, while considering the question of fixation of inter se seniority where quota for direct recruits and

the promotees were prescribed, held that the quota system does not necessitate the adoption of the rotational rule in practical application. Many ways of working out quota prescription can be devised of which rota is certainly one. It was further held that while laying down a quota when filling up vacancies in a cadre from more than one source, it is open to Government, subject to tests under Article 16 of the Constitution, to choose 'a year' or other period or the vacancy by vacancy basis to work out the quota among the sources. But once the Court is satisfied, examining for constitutionality the method proposed that there is no invalidity, administrative technology may have free play in choosing one or other of the familiar processes of implementing the quota rule. It was also held that seniority, normally, is measured by length of continuous officiating service. But this does not preclude a different prescription, constitutionality test being satisfied. The Supreme Court held that promotees who have been fitted into vacancies beyond their quota during the period B - the year being regarded as a unit - must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down, rather be pushed down as against direct recruits who were later but regularly appointed within their quota.

6.3 P.S. Mahal Vs. Union of India, reported in AIR 1984 SC 1291 was referred to point out that it was held by the Supreme Court that notwithstanding Rules 2(iii) and 2(iv) of the Central Engineering and Central Electrical Engineering Service (Group A) (Regulation of Seniority) Rules, 1976, the inter se seniority between Assistant Engineers and Assistant Executive Engineers promoted regularly within their respective quota upto 11th December 1974 must be determined on the basis of length of continuous officiation in the grade of Executive Engineers, subject of course to the length of continuous officiation in the case of Assistant Engineers being computed from the date of their confirmation as Assistant Engineers. It was held that carrying forward of 86 posts of Executive Engineers allocable to Assistant Executive Engineers and giving of seniority en bloc to the Assistant Executive Engineers promoted to the carried forward posts by applying the rotational formula for the purpose of determining seniority amongst Assistant Engineers and Assistant Executive Engineers promoted to the subsequent vacancies is ineffective qua Assistant Engineers and Assistant Executive Engineers promoted upto 11th December 1974 and so far as these Assistant Engineers and Assistant Executive Engineers are concerned, their inter se seniority must be held to be

governed by the length of continuous officiation in the grade of Executive Engineers. It will be noted that the Supreme Court in terms held that the rotational rule of seniority was inextricably linked up with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year, it would be grossly discriminatory and unjust to give effect to the rotational rule of seniority. The rotational rule of seniority must obviously break down when there is such massive departure from the quota rule regularly from year to year leading to continuously increasing deficiency in promotions of Assistant Executive Engineers and corresponding excess in promotions of Assistant Engineers.

7. Learned counsel appearing for the respondent authorities contended that the final seniority list was prepared in consonance with the quota prescribed under the rules and that in the final seniority list in fact there were more number of promotees than the vacancies that would have fallen to them in accordance with the quota. It was submitted that the quota rule warranted the application of the rule of arranging seniority by rotation. It was submitted that there was no ground of breach of quota rule raised in the petition. It was also argued that there was nothing on record to show as to whether these petitioners had raised their objections against the provisional seniority list dated 21st May 1984.

8. Learned counsel for the respondents referred to the decision of the Supreme Court in U.P. Secretariat U.D.A. Association Vs. State of U.P. reported in (1999)1 SCC 278, in which it was held that merely because temporary appointment or promotion came to be made, seniority cannot be counted from the date of officiation except when the appointment was made in accordance with rules. It was held that though appointment is temporary, if it was made in accordance with rules and to a substantive vacancy, seniority will be counted from the date of temporary promotion. Necessarily, the quota and rota require to be maintained so as to give effect to the object envisaged under the rules. It was further held that mere inaction cannot be made the ground to contend that the quota rule was broken down. The appointments which were made against the vacancies reserved for direct recruitment were not according to rules and within the quota. It was, therefore, held that the promotees were required to be fitted into the service from the date when they are entitled to fitment in accordance with the quota and rota prescribed under the rules.

9. It will be noticed from the Circular dated 21st May 1984 that a decision was taken by the Government for adopting a rule of seniority in the context of the quota rule which prescribed a ratio of 2:1 for promotees and direct recruits. It is recorded in that Circular that after a careful consideration of the matter as to how the seniority of the promotees and direct recruits be fixed, the Government had decided that as far as the seniority of the Assistant Directors was concerned, it was necessary to observe the ratio provided in the recruitment rules strictly and the seniority list be prepared accordingly. It cannot, therefore, be said that there was no principle of seniority adopted by the Government for fixing the inter se seniority of promotees and direct recruits as per the quota prescribed under the recruitment rules. The fact that there can be a different principle of seniority adopted by the Government cannot mean that the rota rule cannot be implemented where the ratio of promotees and direct recruits is prescribed under the recruitment rules. A principle of seniority may be prescribed in rules or it may be adopted by an executive decision. It does appear from the said Circular dated 21st May 1984 that the State Government evolved the principle of seniority of rotation for being applied for preparing the seniority list of Assistant Directors. It cannot be said that the Government applied this principle arbitrarily nor can it be said that the application of the principle results in any discrimination which would violate the fundamental rights of the petitioners under Articles 14 and 16 of the Constitution of India. A perusal of the final seniority list also does not spell out any discrimination against any of the petitioners. The promotees had no right to be appointed under the recruitment rules in excess of their quota. In fact there are only five direct recruits finding place in the final seniority list out of the total 22 posts, of which 17 are promotees which were in fact in excess of the quota of promotees on the basis of 2 promotees: 1 direct recruit. There is, therefore, no warrant for interference with the impugned seniority list. This petition is, therefore, rejected. Rule is discharged with no order as to costs.

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